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No. _____

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In The Supreme Court of the United States

JENNIFER GRATZ AND
PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT,
AND THE BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

Respondents.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL E. ROSMAN
HANS BADER
CENTER FOR INDIVIDUAL RIGHTS
Suite 300
1233 20th Street N.W.
Washington, D.C. 20036
(202) 833-8400

KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
Suite 230, Superior Place
20300 Superior Street
Taylor, Michigan 48180
(734) 374-8930

DAVID F. HERR
Counsel of Record
KIRK O. KOLBO
R. LAWRENCE PURDY
MICHAEL C. MCCARTHY
KAI H. RICHTER
MASLON EDELMAN BORMAN & BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
(612) 672-8200

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

2. Did the district court correctly dismiss the plaintiff class's claim for injunctive relief with respect to the University of Michigan's use of racial preferences in undergraduate admissions?

3. Did the individual defendants violate the clearly established legal rights of plaintiffs, so that they are not entitled to summary judgment on the ground of qualified immunity?

PARTIES TO THE PROCEEDING

Petitioners are Jennifer Gratz and Patrick Hamacher. They are plaintiffs in the District Court and appellants in the Court of Appeals. They bring this action on their own behalf and petitioner Hamacher also brings it on behalf of a certified class of similarly situated persons.

Respondents are Lee Bollinger, James J. Duderstadt, and The Board of Regents of the University of Michigan. They were defendants in the District Court and appellees in the Court of Appeals.

The following additional respondents were defendant-intervenors in the District Court and appellants in the Court of Appeals:

> Ebony Patterson, Ruben Martinez, Laurent Crenshaw, Karla R. Williams, Larry Brown, Tiffany Hall, Kristen M.J. Harris, Michael Smith, Khyla Craine, Nyah Carmichael, Shanna Dubose, Ebony Davis, Nicole Brewer, Karla Harlin, Brian Harris, Katrina Gipson, Candice B.N. Reynolds, by and through their parents or guardians, Denise Patterson, Moises Martinez, Larry Crenshaw, Harry J. Williams, Patricia Swan-Brown, Karen A. McDonald, Linda A. Harris, Deanna A. Smith, Alice Brennan, Ivy Rene Carmichael, Sarah L. Dubose, Inger Davis, Barbara Dawson, Roy D. Harlin, Wyatt G. Harris, George C. Gipson, Shawn R. Reynolds, and Citizens for Affirmative Action's Preservation

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari before judgment to review a decision of a United States District Court for the Eastern District of Michigan. The decision of the District Court is presently pending in the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the District Court (App. at 1a) for which this petition is filed is reported at 122 F. Supp. 2d 811 (E.D. Mich. 2000). The decision of the District Court with respect to the arguments of the intervenors in this case (App. at 66a) is reported at 135 F. Supp. 2d 790 (E.D. Mich. 2001).

JURISDICTION

The District Court entered its order on January 30, 2001, and a judgment on February 9, 2001. The case is docketed in the court of appeals as Nos. 01-1333, 01-1416, 01-1418, and 01-1438. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Under 28 U.S.C. § 1254(1), this Court may grant a petition for a writ of certiorari to review any case that is "in" the court of appeals, even if a final judgment has not been entered by that court. *United States v. Nixon*, 418 U.S. 683, 692 (1974).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

2. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d states:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits

of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

3. 42 U.S.C. § 1981(a) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of person and property. . . .

4. 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioners request this Court to exercise its power and discretion under Rule 11 of its rules to grant a writ of certiorari before judgment to the United States Court of Appeals for the Sixth Circuit, which has not yet entered judgment on an appeal of this case pending before it. The case presents questions about what constitutes a compelling interest that may justify a state-supported university to give race-based preferences in student admissions to applicants from certain racial or ethnic groups. The district court resolved this issue by concluding that diversity is a compelling interest. The appeal of the case was heard by the Sixth Circuit, sitting *en banc*, on the same day (December 6, 2001) that it heard *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3154 (August 9, 2002) (No. 02-241), which involves similar claims made against the University of Michigan Law School. Although the Sixth Circuit had

ruled that the appeals of the cases would be expedited (*see* discussion *infra* at 13 & n.2), it has issued an opinion (filed on May 14, 2002) in *Grutter* only, in which it ruled, among other things, that diversity is a compelling interest justifying the use of racial preferences in university admissions. The Fifth, Ninth, Eleventh, and Sixth Circuits have split on this issue of profound national importance.

The case presents additional questions concerning what constitutes appropriate "narrow tailoring" of an admissions policy designed to achieve diversity; whether the district court correctly dismissed the plaintiff class's claim for an injunction; and whether the individual defendants were entitled to summary judgment on grounds of qualified immunity. The district court, although invalidating the University's racial preferences at issue for the years prior to, and for one year after the commencement of, the action (1995-1998), summarily dismissed the plaintiff class's request for injunctive relief in its entirety. It also upheld large, rigid, mechanical racial preferences in effect in 1999 and at the time of the district court's ruling in December 2000. The district court's conclusion that the later policies met narrow-tailoring requirements conflicts sharply with the approach to narrow tailoring taken by this Court and by other lower courts.

I. FACTUAL BACKGROUND

A. Plaintiffs

Plaintiffs Jennifer Gratz and Patrick Hamacher applied for admission to the University of Michigan's College of Literature, Science & the Arts (hereinafter "University" or "LSA") for the fall academic terms that commenced in 1995 and 1997, respectively. App. at 109a.[1]

[1] Many of the statements of facts contained in the petition herein are based on a "Joint Summary of Undisputed Facts" that was submitted by the parties to the district court and that is included in the appendix at App. 106a-118a. Additional citations herein are to documents contained in the

(Continued on following page)

Both Gratz and Hamacher were initially placed on a "waitlist" for admission, and were subsequently denied admission. They are both white and at all material times were residents of the state of Michigan. *Id.*

Ms. Gratz applied with a 3.8 high school grade point average and an ACT score of 25. JA at 543. She was notified by letter dated January 19, 1995, that the LSA had "delayed" a final decision on her application until early to mid-April. App. at 109a.

By letter dated April 24, 1995, the University wrote to inform Ms. Gratz that it was unable to offer her admission. *Id.* The University invited Ms. Gratz to place her name on an "extended waiting list," but went on to state that it "expect[ed] to take very few students from the extended waiting list," and "recommend[ed] students make alternative plans to attend another institution." *Id.* Ms. Gratz did so by accepting an offer for admission into the freshman class of another institution, the University of Michigan at Dearborn, where she enrolled in the fall of 1995 and graduated in 1999. *Id.*

Plaintiff Patrick Hamacher applied in 1996 for admission into the fall 1997 freshman class of the LSA. *Id.* He had a 3.32 high school grade point average and a 28 ACT score. JA at 280-95. By letter dated November 19, 1996, the University informed Mr. Hamacher that it "must postpone" a decision on his application until "mid-April." App. at 109a.

On or about April 8, 1997, the University informed Mr. Hamacher that after further review, it was unable to offer him admission to the LSA. *Id.* at 109a-110a. As a result of the denial, Mr. Hamacher accepted admission

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Joint Appendix ("JA") filed by the parties in the Sixth Circuit, or to record materials contained in the Lodging ("Lodg.") filed contemporaneously with this petition.

into another institution, Michigan State University, where he enrolled in the fall of 1997 and graduated in 2001.

B. The University's Admissions Policies and Practices

Defendants admit that they use race as a factor in making admissions decisions and that the race of plaintiffs Gratz and Hamacher was not a factor that "enhanced" the consideration of their applications. JA at 151. The University and LSA are the recipients of federal funds. *Id.*

Defendants justify the use of race as a factor in the admissions process on one ground only: that it serves a "compelling interest in achieving diversity among its student body." *Id.* at 314. Admission to the LSA is selective, meaning that many more students apply each year than can be admitted, and the University rejects many qualified applicants. App. at 108a. Defendants, however, have a policy to admit all qualified applicants who are members of one of three select racial minority groups – African American, Hispanic, and Native American – (which defendants often refer to as "underrepresented" groups):

> [M]inority guidelines are set to admit all students who qualify and meet the standards set by the unit liaison with each academic unit, while majority guidelines are set to manage the number of admissions granted to satisfy the various targets set by the colleges and schools.
>
> . . . .
>
> . . . Thus, the significant difference between our evaluation of underrepresented minority groups and majority students is the difference between meeting qualifications to predict graduation rather than selecting qualified students one over another due to the large applicant pool.

Lodg. at L.2, L.5. Defendants acknowledge that their consideration of race in the admissions process has the effect of admitting virtually every qualified applicant from any of the designated underrepresented minority groups.

App. at 111a. The University generally defines a "qualified" applicant as one who could be expected, on the basis of the information contained in his or her application, to achieve passing grades as a student in the school to which the applicant has applied for admission. JA at 331.

1. Admissions Policies for 1995-1997

Written "Guidelines" for all LSA classes commencing in 1995, 1996, and 1997 have in common the use of grids or tables that are divided into cells representing different combinations of small ranges of adjusted high school grade point averages and scores on ACT or SAT tests. App. at 111a-113a, 115a; Lodg. at L.8-11, L.17-18, L.25-26. The grade point averages are adjusted first by clerical employees and second by admissions counselors. App. at 111a-112a. The adjustments made by the admission counselors are based on application of separate written "SCUGA" guidelines, which result in a score on a four-point scale ("GPA 2") that is represented in the tables for each year. *Id.* The SCUGA guidelines call for addition or subtraction of points based on the quality of an applicant's high school ("S"), strength of curriculum ("C"), unusual circumstances ("U"), geographic factors ("G"), and alumni relationships ("A"). App. at 111a-112a; Lodg. at L.12-15, L.20-23, L.28-31.

Each cell in the Guidelines tables includes one or more possible actions for consideration by the admissions counselor reviewing an applicant's file. Generally, the Guidelines actions fall into one of the following categories: admission, rejection, delay (*e.g.*, for more information) or postpone ("wait-list" due to limited available spaces). The Guidelines for applicants in 1995 (which included Jennifer Gratz) had four *separate* tables, one for each of the following groups of applicants: in-state non-minority students; out-of-state non-minority students; in-state minority students; and out-of-state minority students. App. at 112a; Lodg. at L.8-11. For applicants for the 1996 and 1997 classes (which included Patrick Hamacher), there were two tables – for in-state and out-of-state applicants – and

minority and non-minority action codes are provided for *separately* in each of the individual cells, with the top row of the cell representing the Guidelines action for non-minority students and the bottom two rows for minority applicants and disadvantaged or other students designated as underrepresented. App. at 112a-115a; Lodg. at L.17-18, L.25-26. The addition of a new "SCUGA" factor for underrepresented minority status in 1997 had another consequence: underrepresented minorities, *solely based on their race*, had one-half point (.5) added to their grade point average calculation used in the already discriminatory Guidelines tables. App. at 115a; Lodg. at L.30.

The Guidelines establish that admissions decisions for non-minorities are generally more selective, requiring higher GPA 2 and test scores for admission, than admission decisions for minority applicants. *Id.* at L.8-11, L.17-18, L.25-26. In some cases, the Guidelines called for automatic rejection based on low grades or test scores; underrepresented minorities, however, were *never* rejected automatically. JA at 329, 338, 358.

In the case of Jennifer Gratz, her adjusted high school grade point average ("GPA 2") of 3.8 and ACT score of 25 placed her in a cell that called for a "postpone" on the first review under the 1995 Guidelines, which was the first action taken with respect to her. JA at 543; App. at 109a; Lodg. at L.8. For a minority applicant (in-state or out-of-state) with the same combination of "GPA 2" and test score, the Guidelines called for a decision to "Admit." *Id.* at L.10-11.

Patrick Hamacher had an adjusted grade point average ("Selection Index") of 3.0 and an ACT score of 28, which placed him in a cell in the 1997 Guidelines that called for postponement of non-minority students and delay or admission of minority students (whose Selection Index was augmented by .5 for race). JA at 280-95, 544; App. at 109a-110a; Lodg. at L.25.

The admissions data show that the two-track guidelines had their intended effect. Given comparable grades and test scores, the rates of admission for students from

the "underrepresented" racial and ethnic groups are generally much higher than the rates for students from the disfavored racial and ethnic groups. In 1995, for example, students whose grades and test scores placed them in the same "grid" as Jennifer Gratz had an admission rate of 100% (46/46), *id.* at L.61, while the rate of admission for students from other races and ethnicities in these grids was less than one in three (378/121), *id.* at L.62. The data show that the admission rates for "underrepresented" minorities within a given grid are often 90% to 100%, while the rates for students from other races in the same grids are usually far lower. *Id.* at L.61-66.

2. Admissions Policies for 1998-2000

The LSA Guidelines for fall 1998 freshman enrollments (adopted after commencement of the lawsuit) dispensed with the tables and cells used in prior years. The new guidelines used a "Selection Index" calculated on a variety of factors and scored on a scale of up to 150 points. App. at 116a; Lodg. at L.36-40. For example, the 1998 Guidelines actions to be taken on an application are divided linearly as follows: 100 to 150 points (admit); 95-99 points (admit or postpone); 90-94 points (postpone or admit); 75-89 points (delay or postpone); 74 points and below (delay or reject). App. at 116a; Lodg. at L.32-35.

The factors used to calculate an applicant's "Selection Index" under the 1998 Guidelines are similar to factors used in prior years. Up to 80 points can be based on high school grade point average (*e.g.*, 40 points for a 2.0 GPA; 60 points for a 3.0; and 80 points for a 4.0). App. at 116a; Lodg. at L.36-40. Up to 12 points, representing a *perfect* ACT/SAT score, can be earned for performance on either of the two standardized tests; up to 10 points for quality of school; from 8 to -4 points for strength or weakness of high school curriculum; 10 points for in-state residency; 4 points for alumni relationships; 1 point for an outstanding essay (changed to 3 points beginning in 1999); and 5 points for personal achievement or leadership on the national level. Under a "miscellaneous" category, 20 points are added

for one of several factors, including an applicant's membership in an underrepresented racial or ethnic minority group. App. at 116a; Lodg. at L.39-40.

The University adopted the 1998 Guidelines with the intent to admit and enroll the same composition of class as had been admitted and enrolled under the previous Guidelines. In adopting the 1998 Guidelines, defendants did not intend to increase or decrease from prior years the extent to which they considered race and ethnicity in the admissions process. The parties have stipulated that the change from the tables to the selection index did not constitute a substantive change in the way that race and ethnicity were considered in the admissions process. App. at 116a. Defendants continued to use the 150-point Selection Index system for years 1999 and 2000 (the year the district court heard the motions for summary judgment). *Id.* at 117a; Lodg. at L.41-60.

For years 1995-1998, defendants admitted all qualified applicants from the "underrepresented" minority groups as soon as possible, without deferring or postponing (waitlisting) their applications. App. at 113a. Students from other racial groups, like Jennifer Gratz and Patrick Hamacher, could have their applications deferred or postponed. Beginning in 1999, defendants abandoned their approach of "immediately" admitting all qualified underrepresented minority students. Instead, admissions counselors were permitted to "flag" for later consideration a file that fell into certain established classifications. *Id.* at 117a. One of those classifications consisted of qualified underrepresented minority students meeting a designated selection index score. *Id.*

For years 1995-1998, defendants also "reserved" or "protected" spaces in the class for members of certain groups of students, including students from one of the three underrepresented minority groups. *Id.* at 114a-115a. According to defendants, "as applicants from a particular group are admitted over the course of the admissions season, the protected spaces reserved for that group are used." JA at 310, 319. If the pool of qualified applicants

from these underrepresented minority groups never reached the number of "protected spaces," those slots "opened up" and could be filled by students who were not members of one of the underrepresented racial groups. *Id.*

II. PROCEEDINGS BELOW

A. The District Court

This action commenced in October 1997. The Complaint alleged that defendants operated an admissions system that illegally discriminated on the basis of race in violation of 42 U.S.C. §§ 1981, 1983, and 2000d. JA at 40-42. Plaintiffs sought, among other things, declaratory and injunctive relief, and damages. *Id.* at 41-42.

The district court certified a class of plaintiffs, pursuant to Federal Rule of Civil Procedure 23(b)(2), in an opinion and order filed December 23, 1998. The intervenors were made parties to this case following an order of the Sixth Circuit reversing the district court's order denying intervention. *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (reversing orders denying intervention in both *Gratz* and *Grutter*).

The district court heard the parties' motions for summary judgment on November 16, 2000. In an opinion filed on December 13, 2000, and order filed on January 30, 2001, the district court granted plaintiffs' motion for partial summary judgment with respect to declaring defendants' admissions system for years 1995-1998 unlawful, App. at 43a-48a; granted defendants' motion for summary judgment with respect to their 1999 and 2000 admissions systems and plaintiffs' claim for injunctive relief, *id.* at 34a-43a; granted the motion of defendants Bollinger and Duderstadt for summary judgment on grounds of qualified immunity, *id.* at 48a-50a; and denied defendant Board of Regents' motion for summary judgment on grounds of Eleventh Amendment immunity, *id.* at 50a-54a. The January 30, 2001, Order also included a certification pursuant to 28 U.S.C. § 1292(b). *Id.* at 58a. On February 9, 2001, the district court entered an order under Federal Rule of Civil

Procedure 54(b) for entry of judgment with respect to the Section 1983 claims against the individual defendants, *id.* at 60a-62a; and a judgment to that effect was entered on the same day, *id.* at 63a-64a. In a separate opinion filed on February 26, 2001, *id.* at 66a, and order filed on March 21, 2001, *id.* at 95a, the district court rejected the arguments of the intervening defendants for justifying the defendants' racial preferences.

In its December 13, 2000, opinion, the district court concluded that diversity was a compelling interest. *Id.* at 14a-32a. It did not expressly state that Justice Powell's diversity rationale in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), constituted the rationale for the holding of this Court in that case. *See Hopwood v. Texas*, 236 F.3d 256, 275 n.69 (5th Cir. 2000) ("Although decided contrary to *Hopwood II*, [78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996)], with respect to the constitutional validity of the diversity rationale, *Gratz* is nevertheless consistent with our position that the *Hopwood II* panel was neither constrained to accept, nor required to reject, diversity as a compelling state interest under binding Supreme Court precedent"). In fact, the district court stated that it did "not necessarily agree with the Ninth Circuit's conclusion [in *Smith v. University of Washington, Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001)] that Justice Powell's" analysis was the "narrowest" rationale for the holding of this Court by application of the analysis approved in *Marks v. United States*, 430 U.S. 188, 193 (1977). App. at 17a. Nonetheless, the district court added that it "reache[d] the same ultimate conclusion as the Ninth Circuit, *i.e.*, that under *Bakke*, diversity constitutes a compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process, albeit through somewhat different reasoning." App. at 17a.

The district court held that the admissions policies for years 1995-1998 were not narrowly tailored, *id.* at 43a-48a, but that the policies in effect in 1999 and 2000 (when the motions for summary judgment were argued) were narrowly tailored, *id.* at 34-43a. It reached this bifurcated

result by concluding that there were substantive differences in the policies for these two time periods. The conclusion contradicted the parties' stipulated fact that the substance of defendants' consideration of race had not changed over these years. *Id.* at 116a.

Although the district court ruled the 1995-1998 admissions systems unlawful, it neither enjoined their use, as plaintiffs had sought, nor explained why an injunction was not appropriate. To the contrary, it granted defendants' motion for summary judgment with respect to the claims for an injunction. Finally, although the district court concluded that it was "clear" that the 1995-1998 admissions systems were the functional equivalent of a quota and "ran afoul of Justice Powell's opinion in *Bakke*," it dismissed plaintiffs' Section 1983 claims on qualified immunity grounds. *Id.* at 48a-50a.

B. The Court of Appeals

There were four separate appeals taken to the Sixth Circuit from the decisions of the district court. The district court had entered an order dated January 30, 2001, which both effectuated the decisions made in the December 13, 2000, opinion and made the necessary findings pursuant to 28 U.S.C. § 1292(b). Defendants filed a petition, and plaintiffs filed a cross-petition, seeking permission to appeal from the January 30, 2001, order. The Sixth Circuit granted both requests for permission to appeal by order dated March 26, 2001. The two appeals were docketed in the court of appeals as appeal numbers 01-1416, and 01-1418.

Plaintiffs also filed as a matter of right, pursuant to 28 U.S.C. § 1292(a), an appeal from the district court's summary judgment dismissing the plaintiff class's request for injunctive relief. In the same appeal, plaintiffs sought review as a matter of right, pursuant to 28 U.S.C. § 1291, of the district court's final judgment (for which it had directed entry pursuant to Rule 54(b)) dismissing their claims against the individual defendants in their individual capacities on grounds of "qualified immunity." This appeal was docketed as appeal number 01-1333.

The fourth appeal was filed by the intervenors with respect to the decision of the district court rejecting the intervenors' proffered justifications for the University's use of racial preferences in admissions. This appeal was docketed as appeal number 01-1438.

On April 2, 2001, defendants in this case and *Grutter v. Bollinger* moved to consolidate the two cases and expedite the appeals. Defendants cited both the need for clear instructions concerning their own admissions practices and the national significance of the issues as reasons to expedite both appeals.[2] On May 11, 2001, plaintiff filed a petition for initial hearing *en banc* of this case and *Grutter v. Bollinger.*

On August 28, 2001, the Sixth Circuit issued an order scheduling the case for oral argument on October 23, 2001, the same date that the court separately scheduled *Grutter v. Bollinger* for oral argument. On October 19, 2001 (four days before the scheduled panel argument), the court issued an order granting the petition for initial hearing *en banc* and rescheduling the oral argument in both cases for December 6, 2001. The order is contained in the appendix at App. 100a and is reported at 277 F.3d 803.

On May 14, 2002, the Sixth Circuit issued its 5-4 decision in *Grutter v. Bollinger*, 288 F.3d 732, 757 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3154 (August 9, 2002) (No. 02-241). The court held that "diversity" was a compelling interest as a matter of law under the rationale articulated solely by Justice Powell in *Bakke*. *Id.* at

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[2] Although the Sixth Circuit did not directly address these motions with respect to the two cases, it subsequently issued orders referring to the two cases as "consolidated." App. at 101a; *id.* at 104a. It also ordered the appeal in *Grutter v. Bollinger* "expedited," *see Grutter v. Bollinger*, 247 F.3d 631, 633 (6th Cir. 2001), and twice subsequently scheduled oral argument of the two cases for the same day. *See also Grutter v. Bollinger*, 288 F.3d 732, 757 (6th Cir. 2002) (Moore, J., concurring) ("[T]he chief judge ordered that the appeals in *Grutter* and *Gratz* be expedited."), *petition for cert. filed*, 71 U.S.L.W. 3154 (August 9, 2002) (No. 02-241).

739-42. The Sixth Circuit also held that the law school's use of racial preferences was narrowly tailored to achieve the objective of diversity. *Id.* at 744-52. The plaintiff in that case has petitioned this Court for a writ of certiorari. *See* Docket No. 02-241

The May 14, 2002, opinion in *Grutter* noted that the Sixth Circuit would separately render its decision in this case in a "forthcoming" opinion. *See Grutter v. Bollinger,* 288 F.3d at 735 n.2. As of the date of filing of this petition, the Sixth Circuit has not issued its opinion in this case.

REASONS FOR GRANTING THE WRIT

I. This Court Should Exercise Its Power to Grant Review Before Judgment.

Rule 11 of this Court's rules provide that a writ of certiorari before judgment in a case pending in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." For several reasons, the circumstances of this case make it appropriate for granting such early review.

First, the case presents issues of fundamental national importance. *See* discussion *infra* at 24-30. It concerns important constitutional and civil rights, and the resolution of these issues will almost certainly have effects that extend far beyond the parties to the case.

Second, this Court has before it a petition for certiorari filed on August 9, 2002, in *Grutter v. Bollinger*, which seeks review of a decision by the same court of appeals in which this case is pending, which involves many of the

same parties,[3] and which presents issues that are in many respects identical or very similar to those raised in this case. There are, however, also differences between the two cases. Among other things, a comparison of the cases shows how racial preferences can take different forms, while inflicting the same kinds of harm. While each case itself is separately worthy of this Court's review, the two cases considered together will present the Court with a broader spectrum and more substantial record within which to consider and rule upon the common principles that they involve than if only one case is considered, or if they are resolved separately and at different times or in different terms. In a number of cases, this Court has found it appropriate to grant review before judgment when another similar case has already been accepted for review by the Court. For example, in considering a petition for certiorari in *Brown v. Board of Education*, 344 U.S. 1, 3 (1952), the Court took judicial notice of a similar case pending in the court of appeals and invited the filing of a petition for review in that case, *id.* at 3, which was subsequently granted, *see Bolling v. Sharpe,* 344 U.S. 873 (1952). *See also Taylor v. McElroy*, 358 U.S. 918 (1958) (certiorari granted before judgment "because of the pendency here" of another case, *Greene v. McElroy*, 360 U.S. 474 (1959), which involved the same important constitutional issues and which was pending in the same court of appeals); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (certiorari granted before judgment "by reason of the close relationship of the important question raised to the question presented" in a case for which the Court had already granted certiorari, *Porter v. Lee*, 328 U.S. 246 (1946)).

[3] The Board of Regents of the University of Michigan and Lee Bollinger, formerly president of the University and prior to that dean of its law school, are defendants in both the *Gratz* and *Grutter* cases.

Third, the absence of a decision from the Sixth Circuit in this case should make no difference on the common principal issues related to compelling-interest and narrow-tailoring analyses raised by the two cases. The Sixth Circuit decided the first issue as a matter of law in *Grutter v. Bollinger,* 288 F.3d at 738-44 (holding diversity to be a compelling interest). Presumably, in eventually deciding this case, the Sixth Circuit would follow its own recent precedent as to those issues. Accordingly, this Court already has for evaluation the reasoning of the Sixth Circuit on compelling-interest analysis. As to narrow-tailoring, the Sixth Circuit has also already laid out its analytical approach to the issue. *Id.* at 744-52.

The sharp division in the lower courts (*see* discussion *infra* at 20-24) has itself created circumstances whereby the various competing arguments on compelling interest and narrow tailoring have been fully developed. These considerations, plus the circumstance that the district court decided the case on summary judgment, subjecting it to *de novo* review by this Court and the Sixth Circuit, militate against waiting for a decision from the Sixth Circuit. This is particularly true given the benefits of having the cases considered together.

Fourth, the effect on members of the class caused by the Sixth Circuit's delay is also a consideration that weighs in favor of granting review at this time. Because the University starts making admissions decisions in the fall for the class to be enrolled in the following fall, inaction by the Sixth Circuit has already meant that many members of the class now applying for admission will compete for scarce admissions spots under a race-based dual system. Although it is unknown when the Sixth Circuit would eventually render a decision in this case, the delay that has already occurred – nearly ten months since the case was argued and over nineteen months since the appeal was filed – is incompatible with the time-sensitive nature of the admissions process (and with the Sixth Circuit's ruling (*see* discussion *supra* at 13 & n.2) that the appeal would be expedited). *See Aaron v. Cooper*, 357 U.S. 566, 567 (1958) (denying petition for review before

judgment in school admissions case where belief expressed that court of appeals would "recognize the vital importance of the time element in this litigation" and would act "in ample time to permit arrangements to be made for the next school year"). *Cf. United States v. Clinton*, 524 U.S. 912 (1998) (denying petition for review before judgment while noting that "[i]t is assumed the Court of Appeals will proceed expeditiously to decide this case").

Finally, granting review at this time will not deny the Court the time to reflect adequately on the important issues at stake. The petition has been filed in time to permit, if it is granted, briefing on the merits in the normal course and consideration by this Court during the 2002 term. Moreover, if the Court grants review in *Grutter v. Bollinger*, the two cases could, at the Court's direction, be briefed on the merits under a simultaneous schedule, argued on the same day, and decided during the same term.

Although this Court rarely exercises its power to grant review before judgment, this is one of the rare cases where the Court should grant the petition before judgment.

II. The *Bakke* Case

This Court has not directly addressed the issue of permissible race-conscious admissions policies in higher education since it did so nearly twenty-five years ago in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke,* this Court found that the admissions program of the University of California Medical School at Davis, which set aside 16% of the places in the class for educationally or economically disadvantaged minorities, violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Five Justices, including Justice Powell, held that the Davis program unlawfully considered race in the admissions process.

Another group of five Justices, also including Justice Powell, reversed the judgment of the California Supreme

Court enjoining Davis from using race as a factor in admissions under any circumstances. In this conclusion, Justice Powell was joined by Justice Brennan, who wrote an opinion joined by Justices Blackmun, Marshall, and White that would have upheld the Davis admissions system.

Justice Powell, applying strict scrutiny to the Davis program, concluded that academic freedom, although not a specifically enumerated Constitutional right, was a "special concern" of the First Amendment and thus a sufficiently compelling interest to meet strict scrutiny. *Bakke*, 438 U.S. at 312 (Powell, J.). "Academic freedom" included the freedom to determine who would be allowed to study at a state university. *Id.*

While rejecting the argument that Davis's specific program of reserving spaces for disadvantaged minorities was necessary to achieve the robust exchange of ideas that the Regents allegedly wanted, Justice Powell did state that race and ethnicity could be considered as "plus" factors by universities seeking to achieve that goal. He cited to the text of the so-called "Harvard plan," which he said would pass constitutional muster under his approach. *Id.* at 316-18.

Justice Powell specifically disapproved of an admissions system that reserved a specified number of spaces in the class for members of particular minority groups or that operated "as a cover for the functional equivalent of a quota system." *Id.* at 315, 318. He found that the Davis "dual admission" or "two-track" system, *id.* at 314-15, in which a number of seats in the medical school class were reserved on the basis of an "explicit racial classification," *id.* at 319, violated the Equal Protection Clause, *id.* at 319-20.

Although Justice Brennan seemingly rejected "strict scrutiny," *Bakke,* 438 U.S. at 357 (Brennan, J.), he borrowed a scrutiny level from gender-discrimination cases that he characterized as "strict and searching." *Id.* at 362. Specifically, he required the use of race to serve important

governmental objectives and to be substantially related to achieving those objectives. *Id.* at 359.

Justice Brennan concluded that the Davis program met his "strict and searching" scrutiny analysis because remedying the effects of past societal discrimination was a sufficiently important governmental objective, and because the Davis program was, in his view, substantially related to achieving that objective. In reaching the latter conclusion, Justice Brennan stated that remedies for past discrimination need not be limited to victims identified by specific proof, but that they should be limited to those "within a general class of persons likely to have been the victims of discrimination." *Id.* at 363. In finding that the Davis program met that requirement, Justice Brennan emphasized:

> [T]he Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program.

Id. at 377. *Cf. id.* at 275 n.4 (Powell, J.) (the admissions chairman would confirm "disadvantage" of individual applicants).[4]

Justice Brennan did not mention or endorse the "academic freedom" or "diversity" rationale of Justice Powell. He did state that something like the "Harvard

[4] Indeed, that is how Justice Brennan viewed the "Harvard plan" – an admissions system that "openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to *disadvantaged* minority students." *Bakke*, 438 U.S. at 379 (Brennan, J.) (emphasis added).

plan" would be "constitutional under our approach, *at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.*" *Id.* at 326 n.1 (Brennan, J.) (emphasis added). While recognizing that no one opinion spoke for the Court, Justice Brennan purported to describe the "central meaning" of the various opinions without any reference to the "academic freedom" or "diversity" rationales:

> Government may take race into account when it acts not to demean or insult any racial group, but to *remedy disadvantages cast on minorities by past racial prejudice*, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Id. at 325 (emphasis added).

In the only part of Justice Powell's Equal Protection analysis that was joined by Justice Brennan, Part V-C, nothing was said, much less endorsed, about justifying racial preferences on grounds of diversity or academic freedom. *Id.* at 320 (Powell, J.).

III. The Lower Courts Are Divided.

Aside from Justice Powell's opinion in *Bakke*, the opinions of this Court have never before or since addressed whether diversity or academic freedom are compelling interests justifying racial preferences in university admissions. Subsequent opinions have included comment on the fractured nature of the *Bakke* opinions. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 218 (1995) ("*Bakke* did not produce an opinion for the Court."); *Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001) (Stevens, J., dissenting) (The five Justices in *Bakke* who voted to overturn the injunction imposed by the lower courts "divided over the application of the Equal Protection Clause – and by extension Title VI – to affirmative action cases. Therefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a

majority for any particular substantive interpretation of Title VI").

In other contexts, this Court's more recent decisions have recognized only one interest as sufficiently compelling to justify racial classifications: remedying past, identified discrimination. *Shaw v. Hunt*, 517 U.S. 899 (1996) (voting rights and redistricting). It has expressed disapproval of recognizing as "compelling" interests that are "amorphous" and that have "no logical stopping point." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 498-99 (1989) (O'Connor, J.); (citing and quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (plurality opinion)); *id.* at 520 (Scalia, J.).

Not surprisingly, then, the lower courts have struggled and disagreed about whether academic freedom or diversity are interests that can justify racial preferences in student admissions. The Fifth and Eleventh Circuits have held that Justice Powell's opinion in *Bakke* with respect to diversity *did not* constitute a rationale for the holding of the Court. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), the Fifth Circuit determined that Justice Powell spoke for no other Justice concerning diversity, and that Justice Brennan had implicitly rejected diversity as a compelling governmental interest. *Id.* at 944. *See also Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000) (Wiener, Stewart, JJ.). Concluding that this Court's precedents had not resolved whether diversity was a compelling interest, the Fifth Circuit analyzed the question and determined that it was not. *Hopwood*, 78 F.3d at 945-46.

The Eleventh Circuit, in a case involving a challenge to racial preferences in admissions at the University of Georgia, reviewed the opinions in *Bakke* and determined that the *Marks* analysis did not support a conclusion that Justice Powell's opinion concerning diversity was the holding of the Court. *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1247-49, 1254-64 (11th Cir.

2001). Ultimately, the Eleventh Circuit concluded that whether diversity was a compelling interest was an "open question," but that it need not be decided in the case before it because the University of Georgia's racial preferences under review were not narrowly tailored to achieve an interest in diversity. *Id.* at 1250, 1254-64.

In contrast, the Sixth and Ninth Circuits have concluded that Justice Powell's opinion with respect to diversity constitutes the rationale for the holding of the Court in *Bakke* through application of the *Marks* analysis. *Grutter v. Bollinger*, 288 F.3d at 738-44; *Smith v. University of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

Other courts of appeals have noted expressly or implicitly that this Court has not resolved whether diversity is a compelling interest. *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130 (4th Cir. 1999) (elementary school student admissions) ("whether diversity is a compelling governmental interest remains unresolved"), *cert. denied*, 529 U.S. 1019 (2000); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704-05 (4th Cir. 1999) (same); *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (middle school student admissions) ("[W]e need not definitively resolve this conundrum [whether diversity is compelling] today."). *Cf. Taxman v. Board of Educ.*, 91 F.3d 1547, 1563-64 (3rd Cir. 1996) (holding that "[w]hile the benefits flowing from diversity in the education context are significant indeed," they did not satisfy requirements for use of racial preferences under Title VII), *cert. granted*, 521 U.S. 1117, *appeal dismissed per stipulation*, 522 U.S. 1010 (1997); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir.) (preferences in employment) ("whether [non-remedial] justifications are possible is unsettled"), *cert. denied*, 525 U.S. 981 (1998); *Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344, 354-56 (D.C. Cir. 1998) (rejecting racial diversity as a compelling interest justifying racial preferences in the award of broadcast licenses).

The district court's narrow-tailoring analysis with respect to the 1999-2000 admissions policies also diverges from the approach taken by other circuits. In upholding an admissions system that mechanically grants a large, fixed racial preference to all members of specified racial minorities, the decision is inconsistent with the results in other cases. For example, the Eleventh Circuit considered and struck down on narrow-tailoring grounds an admissions system at the University of Georgia that was in many ways comparable to the system at issue here. *See Johnson v. Board of Regents of the Univ. of Georgia*, 263 F.3d at 1254-61.

Justice Powell made clear that a race-based "two-track" admissions system, or one that amounted to the "functional equivalent of a quota system" would be illegal. *Bakke*, 438 U.S. at 316, 319 (Powell, J.). The district court failed to address or explain how the mechanical, rigid, 20-point preference granted by the defendants to all members of specified racial minorities was "functionally" any different from a quota system. *See Tuttle v. Arlington County Sch. Bd.*, 195 F.3d at 707 ("Although the Policy does not explicitly set aside spots solely for certain minorities, it has practically the same result by skewing the odds of selection in favor of certain minorities.").

The district court openly acknowledged that the diversity interest was a permanent one, and yet it did not find this incompatible with the traditional narrow-tailoring requirement that race-conscious remedies be temporary. App. at 26a. Finally, on the questions of the availability of race-neutral alternatives and the indefinite duration of the preferences, the district court's approach was much less rigorous than that employed by other courts. *See, e.g., Tuttle*, 195 F.3d at 706; *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d at 1261; *id.* at 1254 ("We have held that only as a 'last resort' may race be used in awarding valuable public benefits. . . . That principle applies equally to the university admissions process.").

Quite demonstrably, the lower courts are fractured in their understanding about whether diversity is a compelling interest; whether Justice Powell's rationale

articulating the diversity interest is controlling; and even on what Justice Powell meant when he discussed what he considered to be the permissible scope of the use of race as a factor in admissions decisions. Many questions cry out for resolution. If universities may select the racial groups to which they give preferences based on "underrepresentation" of these groups in the student body, how is diversity different in practice from objectives of simple racial balancing? If achieving diversity is a compelling interest sufficient to justify racial preferences in education because of the beneficial effects of obtaining diverse viewpoints, what limiting principle prevents diversity from justifying racial preferences in other areas of life where diverse viewpoints may also be beneficial, like jury selection or employment in positions with responsibility for management or creation of public policy?

If Justice Powell's articulation of the diversity rationale is held to be controlling, then what constitutes the "functional equivalent" of a quota, which his rationale forbids? Is a mechanical, point-based system that automatically awards points to some students solely because of their race or ethnicity consistent with the requirements of narrow tailoring? Is such a system just a "plus" system involving no "facial" intent to discriminate, with "good faith" presumed, *Bakke*, 438 U.S. at 318-19 (Powell, J.)? May a college or university have dual admissions standards, whereby all members of some races are admitted if they meet minimum qualifications, while students from other races are required to compete for admission even though they meet the same minimum qualifications? May a "plus" for race be of any size or substance, so long as the language of a "quota" or "set aside" is avoided? Do traditional factors associated with narrow tailoring, such as the requirement that preferences be temporary, have no application to the diversity rationale?

IV. This Case Presents Issues of Fundamental National Importance.

There can be no serious doubt that the case presents (as does *Grutter v. Bollinger,* in which a petition for

certiorari is pending (02-241)), an issue of great national importance. At the most fundamental level the question it raises is whether our Nation's principles of equal protection and non-discrimination mean the same thing for people of all races. This Court has said in the past that it does. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222 (1995) (standard of review for racial classifications is the same for all races). But the proposition is tested again by this case, and especially by the justifications for unequal treatment put forth by the University and intervenors.

The University of Michigan employs, formally and functionally, a race-based two-track admissions system. It is a quota system more egregious than the one at issue in *Bakke* because the University's preferences have the purpose and effect of admitting *all* qualified applicants from the select minority groups, while requiring qualified students from other racial groups to compete based on the limited number of spaces in the class; in *Bakke*, the quota was limited to 16% of the spaces in the class, and only disadvantaged applicants from the minority groups could be considered for the reserved seats. *Bakke*, 438 U.S. at 274-75.

It is a measure of how formless, standardless, arbitrary, and unlimited in scope the diversity rationale is or has become that the University puts it forward in defending the quota system at issue here. To uphold a quota system like the University's on the basis of Justice Powell's opinion in *Bakke* is either to mock the opinion or to demonstrate how meaningless it has been rendered. Justice Powell did, after all, vote with four other Justices to *strike down* the system at issue in *Bakke*.

This Court has rejected as compelling certain interests that indisputably are good and important, like remedying the lingering effects of societal discrimination and promoting role models for school children. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-77 (1986) (plurality opinion). *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433

(1984) (consideration of "best interests" of child is a substantial governmental interest, but cannot justify consideration of race in making custody determinations). There may be many reasons why an interest is not sufficiently compelling to withstand the strict scrutiny to which all racial classifications must be subjected, but among them certainly are that an interest is by its nature poorly defined, without reasonably ascertainable or objective standards or scope, or "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276 (plurality opinion).

The diversity rationale articulated by the University and accepted by the district court is one that "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration." *J.A. Croson Co.*, 488 U.S. at 498 (O'Connor, J.) (quoting *Wygant*, 476 U.S. at 276 (plurality opinion)). It has "no logical stopping point." *J.A. Croson Co.*, 488 U.S. at 498. Indeed, an interest founded on "underrepresentation" could quite readily justify measures that extend until minority representation in the classroom "mirrors the percentage of minorities in the population as a whole." *Id.* It is a rationale that gives essentially unchecked authority to admissions officers to define what "diversity" or "critical mass" mean; which racial and ethnic groups, among many, are to be considered "underrepresented" or are to receive preferences; the size of the preferences or "plus"; and their duration.

So defined, such an interest is at least as ill-defined and "amorphous" as an interest founded on remedying the lingering effects of societal discrimination or fostering role models for school children. *Wygant*, 476 U.S. at 276 (plurality opinion). *See also Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1250 (11th Cir. 2001) (noting that interest in student diversity is "similar" to other interests rejected as compelling, including remedying effects of societal discrimination and providing role models).

Enshrined as a compelling interest, diversity will instead give the Nation, as the district court's opinion

foreshadows, its first *permanent* legal justification for racial classifications. App. at 26a. That justification, despite the language or label applied, will be one that is indistinguishable from an interest in simple racial balancing. *See Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344, 356 (D.C. Cir. 1998) (noting "how much burden the term 'diversity' has been asked to bear in the latter part of the 20th Century" and that "[it] appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ('affirmative action' has only a temporary remedial connotation) and as a synonym for proportional representation itself"); *Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998) ("Underrepresentation is merely racial balancing in disguise – another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.")

The absence of a limiting principle in the diversity rationale also raises the serious specter that it cannot logically be confined to the higher education context. The University and some of its *amici* have sometimes justified diversity in education based on the segregated lives that students allegedly live prior to entering higher education and by the benefits that supposedly stay with students after they have graduated and joined the workforce.

If diversity is compelling in part because of what goes on *before* and *after* students enter higher education and because it is an antidote to societal discrimination and prejudice, it is hard to imagine why it should not also be sufficiently compelling to support racial preferences in other areas of American life. That is especially so – if it is deemed that racial diversity brings viewpoint diversity – where it can be persuasively argued that having "diverse" viewpoints is beneficial. The possibilities are numerous, including primary and secondary education, employment in management or public policy positions, and jury selection. Although this case does not directly raise these other issues, the answer (and the reasons for the answer) to whether diversity is a compelling interest in higher

education are likely to have important implications outside the higher education context.

There is also a qualitative difference between using race to remedy past, identified instances of governmental discrimination and using it instead to achieve "diversity." When race is used in a narrowly-tailored manner to remedy past, identified discrimination, it is arguably done to right a specific wrong; to *further* the principle of equality by correcting injury done to the principle in defined instances. When, however, race is used to pursue an open-ended objective like "diversity," it is used in *spite* of the principle of equality to further an interest in – diversity. Covering the diversity rationale with arguments about "academic freedom" does not offer it legitimacy under the Constitution or the Nation's civil rights laws: This Court has never held that educational institutions have a First Amendment right to practice race discrimination in admissions. Such a conclusion would be anathema to the outcome and principles articulated in cases like *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Runyon v. McCrary*, 427 U.S. 160, 175-77 (1976) (striking down admissions system that discriminated on the basis of race despite First Amendment rights asserted by school on behalf of parents), and *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-05 (1983) (upholding IRS revocation of tax-exempt status of university because of its racially discriminatory admissions system).

These important issues, about whether the University's preferences survive strict-scrutiny review under the Equal Protection Clause, and whether they violate federal civil rights statutes, Title VI (42 U.S.C. § 2000d) and 42 U.S.C. § 1981, are squarely presented by the first of the Questions Presented in the petition for certiorari. The second and third questions relate to the appropriate remedies for violations of the constitutional and civil rights at issue. Because this is a class action, the rights of many individuals other than the named plaintiffs are at stake. Each year, thousands of students apply to defendants' University in hope of obtaining a place in the class. If this Court finds the defendants' use of racial preferences

unlawful, it should enjoin the use of those unlawful preferences, or direct the lower courts to do so in order that these students can compete for admission under a lawful system.

The district court summarily dismissed petitioner's request for an injunction even though the district court also found the admissions system for 1995-1998 to be unlawful. It never explained the reasons for its grant of summary judgment to defendants on this claim. Under well settled principles, defendants' voluntary cessation of illegal activity – particularly *after* litigation has begun – does not moot a claim for an injunction. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). This is because such belated changes imply that there is still a danger of future violations. Moreover, defendants have continued to defend the system found to be illegal, and they acknowledge that their subsequent admission systems (for years 1999-2000) are not substantively different from the illegal system. A reasonable trier of fact could use that fact to infer a possibility of future harm as well. Given these circumstances, there is at least a reasonable possibility that future violations will resume or continue, so that an injunction is necessary and appropriate; at the very least, sufficient inferences were available to preclude summary judgment. Moreover, if this Court finds the defendants' racial preferences unlawful, the lower courts would benefit from this Court's consideration of the proper scope of an injunction.

Finally, an examination of the lawfulness of the defendants' racial preferences should include review of the district court's judgment in favor of the individual defendants on grounds of qualified immunity. The district court was very explicit about its conclusion with respect to the unlawfulness of the 1995-1998 admissions policies: "It is *clear* that the LSA's system operated as the functional equivalent of a quota and therefore, ran afoul of Justice Powell's opinion in *Bakke*." App. at 45a (emphasis added). Inexplicably and untenably, however, the district court dismissed the claims for damages against the individual defendants on grounds of qualified immunity, *i.e.*, on a

theory that defendants had not violated plaintiffs' "clearly established rights." *Id.* at 48-50. It simply cannot logically be the case that defendants' racial preferences were both a "clear" instance of the "functional equivalent of a quota" in violation of a nearly twenty-five year-old Supreme Court case and that plaintiffs' "clearly established" rights were not thereby violated. If the Court accepts this case for review, petitioner respectfully requests it to review the district court's decision with respect to qualified immunity.

CONCLUSION

For the foregoing reasons, Jennifer Gratz and Patrick Hamacher respectfully request the Court to grant their petition for certiorari before judgment.

Respectfully submitted,

MICHAEL E. ROSMAN
HANS BADER
CENTER FOR INDIVIDUAL RIGHTS
Suite 300
1233 20th Street N.W.
Washington, D.C. 20036
(202) 833-8400

KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
Suite 230, Superior Place
20300 Superior Street
Taylor, MI 48180
(734) 374-8930

DAVID F. HERR
Counsel of Record
KIRK O. KOLBO
R. LAWRENCE PURDY
MICHAEL C. MCCARTHY
KAI H. RICHTER
MASLON EDELMAN BORMAN & BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
(612) 672-8200